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In the

Supreme Court of the United States

OCTOBER TERM, 1984

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

JAMES HAMMOCK, Jr.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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QUESTION PRESENTED

WHETHER THE ILLINOIS APPELLATE COURT ERRONEOUSLY APPLIED THIS COURT'S DECISION IN *EDWARDS V. ARIZONA* RETROACTIVELY WHERE THE TRADITIONAL CONSIDERATIONS EVALUATED IN DETERMINING WHETHER A RETROACTIVE APPLICATION OF A DECISION OF THIS COURT SHOULD OCCUR BALANCE HEAVILY IN FAVOR OF ONLY A PROSPECTIVE APPLICATION OF *EDWARDS*.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Opinion Below	1
Jurisdiction	2
Constitutional Provision At Issue	2
Statement Of The Case	2
Reason For Granting The Writ:	
THE ILLINOIS APPELLATE COURT ERRONEOUSLY APPLIED THIS COURT'S DECISION IN *EDWARDS V. ARIZONA* RETROACTIVELY WHERE THE TRADITIONAL CONSIDERATIONS EVALUATED IN DETERMINING WHETHER A RETROACTIVE APPLICATION OF A DECISION OF THIS COURT SHOULD OCCUR BALANCE HEAVILY IN FAVOR OF ONLY A PROSPECTIVE APPLICATION OF *EDWARDS*	6
Conclusion	11
Appendix:	
A — Opinion Of The Illinois Appellate Court	
B — Trial Court's Ruling	
C — Order Of Illinois Supreme Court Denying Petition For Leave To Appeal	

TABLE OF AUTHORITIES

Cases

PAGE

Blasingame v. *Estelle*, 604 F.2d 894 (5th Cir. 1979) 8

Edwards v. *Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981) 6,8,9,10

Escobedo v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758 (1964) 7

Hill v. *Whealon*, 490 F.2d 629 (6th Cir. 1974) 8

Johnson v. *New Jersey*, 384 U.S. 719, 86 S.Ct. 1772 (1966) 7,8,9

Miranda v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966) 7,8,10

People v. *Hammock*, 121 Ill. App. 3d 874, 460 N.E.2d 378 (1st Dist. 1984) 9,10

Rhode Island v. *Innis*, 446 U.S. 291, 100 S.Ct. 1682 (1980) 10

Solem v. *Stumes*, 104 S.Ct. 1338 (1984) 6,7,8,9

United States v. *Rodriquez-Gastelum*, 569 F.2d 482 (9th Cir.) *cert. denied*, 436 U.S. 919 (1978) 8

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Your Petitioner, the People of the State of Illinois, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Illinois Appellate Court, First Judicial District, entered on February 8, 1984.

OPINION BELOW

The opinion of the Illinois Appellate Court is reported at 121 Ill. App. 3d 874, 460 N.E.2d 378 (1st Dist. 1984), and appears herein as Appendix A. The ruling of the trial court on respondent's motion to suppress evidence is not reported, and appears herein as Appendix B. The order of the Illinois Supreme Court of June 5, 1984,

denying petitioner's petition for leave to appeal without stating reasons, appears herein as Appendix C.

JURISDICTION

The judgment of the Illinois Appellate Court was entered on February 8, 1984. A timely petition for leave to appeal was denied by the Illinois Supreme Court on June 5, 1984. That order appears herein as Appendix C. This petition was filed within 60 days from that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION AT ISSUE

AMENDMENT V

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

Respondent, James Hammock, Jr., was arrested on June 23, 1978, for a traffic offense in Chicago, Illinois. (R. 3-4) On June 25, 1978, he was interviewed by a supervisor of the felony review unit of the Cook County (Illinois) State's Attorney's Office. (R. 62-63) At that

time respondent made a statement to the assistant state's attorney. (R. 66) The hearing on respondent's motion to suppress evidence commenced on January 17, 1980, (R. 2) and was denied that day. (R. 118) Jury selection began on April 7, 1980, and on April 15, 1980, the jury returned a verdict of guilty of murder. (R. 927) On May 18, 1981, nearly 3 years after respondent's arrest and statement, this Court rendered its decision in *Edwards* v. *Arizona*, 451 U.S. 477, 101 S.Ct. 3128 (1981). Subsequently, on February 8, 1984, the Illinois Appellate Court reversed respondent's conviction of murder relying on this Court's decision in *Edwards, supra. People* v. *Hammock*, 121 Ill. App. 3d 874, 460 N.E.2d 378 (1st Dist. 1984). On February 29, 1984, this Court decided *Solem* v. *Stumes*, 104 S.Ct. 1338 (1984), which held that *Edwards* was not to be applied retroactively on collateral review of final convictions but declined to establish where the line as to retroactivity should be drawn.

On Friday evening, June 23, 1978, respondent James Hammock, Jr., drove to a liquor store parking lot located in Brookfield, Illinois. Shortly after arriving there, respondent approached another car parked in the lot. Respondent's victim, Anthony Taylor, was sitting in that car. Respondent told the car's driver to "put him [Taylor] out" of the car. Respondent asked Taylor about Taylor owing him money and began to scuffle with Taylor through the open driver's door window. When the car's driver saw respondent start to remove a brown object from respondent's pocket, the driver slid across the front seat and out the passenger door. As the driver approached the liquor store, about three to five seconds later, he heard numerous gunshots fired. Taylor died at the scene as a result of six gunshot wounds inflicted by defendant.

Later that same evening respondent was arrested in Chicago, Illinois, on a speeding charge. (R. 3-4) When asked if he would submit to a breathalyzer test, respondent indicated that he would prefer to see his attorney before the test. (R. 3-4) Respondent was not administered the breathalyzer test and was held without interrogation at the area police headquarters until Saturday afternoon when he was transferred to the county jail where he remained until Sunday afternoon. (R. 4-5) At approximately 5:00 p.m. Sunday, Brookfield (Illinois) police officers arrived at the county jail and informed respondent of his *Miranda* rights. (R. 5, 10) Although respondent testified that he had told the officers that he would probably have his lawyer on Monday, since he might not be able to reach him on Sunday, that fact is unclear when respondent's testimony is considered in its entirety. (R. 12) It is clear, however, that the officers did not interrogate respondent at any time. (R. 4, 6, 8-9)

Later Sunday evening, the felony review supervisor with the Cook County State's Attorney's Office arrived at the Brookfield police station, learned that respondent had been advised of his *Miranda* rights and reinformed respondent of his *Miranda* rights. (R. 62-63) Defendant requested his attorney at that time and the consistent testimony of both respondent and the assistant state's attorney is that the assistant state's attorney asked respondent who his attorney was, obtained the attorney's telephone number for respondent and gave that number to respondent. (R. 65-66, 51-52) When the assistant state's attorney walked to the door to leave and allow respondent to call his attorney, respondent called out what he would tell the assistant state's attorney what had happened. (R. 66) Respondent was asked again if he wanted his at-

torney and respondent replied: "No, I'll tell you what happened right now." (R. 66) Respondent then made an oral statement and agreed to have his statement videotaped. (R. 66)

In denying respondent's motion to suppress evidence (the videotape of respondent's statement) the trial court stated that it was denying the motion because it could not find any legitimate legal reason for granting it. (R. 118)

The Illinois Appellate Court, omitting from its opinion the corroborated testimony of the assistant state's attorney as to his efforts in providing respondent with his attorney's telephone number prior to questioning, determined that a violation of *Edwards* v. *Arizona,* 451 U.S. 477, 101 S.Ct. 1880 (1981), had occurred, and then applied the *Edwards* holding retroactively. Based upon *Edwards,* the Illinois Appellate Court reversed respondent's conviction of murder.

The petitioner's subsequent petition for leave to appeal was denied by the Illinois Supreme Court.

REASON FOR GRANTING THE WRIT

THE ILLINOIS APPELLATE COURT ERRONEOUSLY APPLIED THIS COURT'S DECISION IN *EDWARDS V. ARIZONA* RETROACTIVELY WHERE THE TRADITIONAL CONSIDERATIONS EVALUATED IN DETERMINING WHETHER A RETROACTIVE APPLICATION OF A DECISION OF THIS COURT SHOULD OCCUR BALANCE HEAVILY IN FAVOR OF ONLY A PROSPECTIVE APPLICATION OF *EDWARDS*.

In reversing respondent's conviction of murder, the Illinois Appellate Court determined that the instant case is "squarely on all fours" with this Court's decision of *Edwards* v. *Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981), and then applied the *Edwards* decision retroactively. This occurred where the *Edwards* decision was raised in neither the Illinois Appellate Court briefs of respondent nor petitioner, and where the Illinois Appellate Court precluded petitioner from adequately responding to the application of the *Edwards* decision at oral argument. Additionally, the Illinois Appellate Court applied *Edwards* despite the fact that respondent's arrest and statement occurred almost 3 years before the *Edwards* decision. Respondent was found guilty of murder over 1 year before the *Edwards* decision. Shortly after the Illinois Appellate Court's decision in the instant case, this Court decided *Solem* v. *Stumes*, 104 S.Ct. 1338 (1984). In *Stumes, supra*, this Court expressly left undecided where the line should be drawn as to the retroactivity of *Edwards*, however the holding of the Illinois Appellate Court from which the writ of certiorari herein is sought is contrary to the intent expressed by this Court concerning retroactive appli-

cation in *Johnson* v. *New Jersey,* 384 U.S. 719, 86 S.Ct. 1772 (1966), and is inconsistent with the logic expressed by this Court in *Stumes, supra.*

In determining whether a new constitutional rule should receive retroactive application, this Court has set forth three criteria to be considered: 1) the purpose to be served by the new standards; 2) the extent of the reliance by law enforcement authorities on the old standards; and 3) the effect on the administration of justice of a retroactive application of the new standards. *Johnson* v. *New Jersey, supra,* 384 U.S. 719 at 727; *Solem* v. *Stumes, supra,* at 1341.

In *Johnson,* this Court determined that its decisions in *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966), and *Escobedo* v. *Illinois,* 378 U.S. 478, 84 S.Ct. 1758 (1964), should be applied only prospectively since, although *Escobedo* and *Miranda* provided new safeguards, the nonretroactivity of those decisions would not preclude individuals whose trials already had been completed from invoking the same safeguards as part of an involuntariness claim, law enforcement agencies had fairly relied on prior case law, which was no longer binding after *Miranda* and *Escobedo,* and additionally the administration of criminal law would be seriously disrupted by the retrial or release of numerous prisoners found guilty by trustworthy evidence conforming with previously announced decisions. *Johnson, supra,* 384 U.S. at 730-731. In *Johnson,* this Court concluded that its decision in *Miranda* should not be prospective from the date of *Escobedo* either since the *Miranda* decision was neither fully anticipated nor clearly foreshadowed by the holding in *Escobedo. Id.* at 734.

In *Solem* v. *Stumes, supra,* at 1345, this Court, based on the same criteria and logic of *Johnson,* determined that, at a minimum, its decision in *Edwards* is not to be applied retroactively as to collateral review of final convictions. In *Stumes,* this Court found that the fact that a suspect has requested a lawyer does not mean that the statements that he makes in response to subsequent police questioning are likely to be inaccurate. Rather, where renewed interrogation raises significant doubt as to the voluntariness and reliability of the statement, and thus the accuracy of the trial's outcome, it is likely that suppression could be achieved without reliance on the rule in *Edwards. Stumes, supra,* at 1342. Secondly, this Court found that the *Edwards* decision did establish a new rule for which it could not fault the police if they had not anticipated its *per se* approach. *Id.* Reflecting that *Edwards* was not a necessary consequence of *Miranda,* this Court concluded that it could be justifiably believed that a waiver of the right to counsel following its invocation could be voluntary even if the police initiated the conversation. *Id.* at 1344. As this Court recognized in *Stumes,* while some courts had prohibited resumption of questioning unless initiated by the suspect, numerous other courts allowed renewed interrogation after a request for counsel (*E. g., Blasingame* v. *Estelle,* 604 F.2d 893 (5th Cir., 1979); *United States* v. *Rodriquez-Gastelum,* 569 F.2d 482 (9th Cir.) *cert. denied,* 436 U.S. 919 (1978); *Hill* v. *Whealon,* 490 F.2d 629 (6th Cir., 1974)). Finally, this Court determined that the retroactive application of *Edwards* would have a disruptive effect on the administration of justice.

While this Court was not required to determine the retroactivity of *Edwards* in a matter other than on collateral review of a final conviction in *Stumes,* the State contends that the very considerations set forth in *Johnson,* and the same determinations made by this Court in *Stumes,* require that the Edwards decision be given prospective application only.

The State further contends that the Illinois Appellate Court's finding that an *Edwards* violation occurred is based on inaccurate findings of fact by the Appellate Court. In the instant case, respondent was not subjected to oppressive conduct upon the part of the police or the prosecution. Respondent was never questioned by the police. After the investigating assistant state's attorney informed respondent of his *Miranda* rights, and was informed by respondent that respondent desired an attorney, respondent was not questioned. Rather respondent was presented with the telephone number of the attorney he had requested. Only after the assistant state's attorney was leaving the room to allow respondent to call his attorney but was called back by respondent when respondent decided to make a statement did any law enforcement official take a statement from respondent. Further, even that statement was taken only after defendant was readvised of his right to have his attorney present and rejected that right willingly. Respondent freely admitted at the hearing that he was given his attorney's telephone number and an opportunity to call his attorney before any questioning took place. (R. 51-52) However, the appellate court, in its opinion, replaced with an ellipses the assistant state's attorney's efforts to provide respondent with respondent's attorney. *People* v. *Hammock,* 121 Ill. App.

3d 874, 877, 460 N.E.2d 378 (1st Dist. 1984). Rather the chronology as presented by the appellate court inaccurately suggests that the assistant state's attorney approached respondent, informed respondent of his *Miranda* rights and asked him if he would make a statement and that respondent then stated he would make a statement. *Hammock, supra,* at 876-877. The State maintains that the transactions omitted in the appellate court opinion are fatal to the appellate court's claim that an *Edwards* violation occurred. Based on the existing case law, the assistant state's attorney did not have any reason to believe his conduct was improper. Indeed the State maintains that the assistant state's attorney's actions of readvising respondent of his *Miranda* rights and providing him with respondent's attorney's telephone number were proper and did not constitute interrogation as envisioned in the *Miranda* decision, the *Edwards* decision or the decision in *Rhode Island* v. *Innis,* 446 U.S. 291, 100 S.Ct. 1682 (1980).

In summary, the Illinois Appellate Court erroneously applied the *Edwards* holding retroactively and erroneously reversed respondent's conviction of murder where the *Edwards* decision has only a tangential relation to truth finding at trial, where it would be unreasonable to expect law enforcement officials to have conducted themselves in accord with the rule prior to its announcement and where retroactive application of *Edwards* would have a disruptive effect on the administration of justice. Further, the Illinois Appellate Court's decision is erroneous since it is based on a distortion of the facts established in the trial court.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully pray that a writ of certiorari issue to review the judgment of the Illinois Appellate Court, First Judicial District, Third Division.

Respectfully submitted,

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APPENDIX A

OPINION OF THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

JAMES HAMMOCK, JR.,
Defendant-Appellant.

First District (3rd Division) No. 80—1597

Reversed and remanded.

Opinion filed February 8, 1984.

PRESIDING JUSTICE RIZZI delivered the opinion of the court:

In a jury trial, defendant, James Hammock, Jr., was convicted of murder, and he was sentenced to 28 years in prison. We reverse the conviction and remand the case for a new trial because the State violated defendant's fifth amendment right to have counsel present during custodial interrogation,[1] and because the second of two videotape reenactments of the homicide was admitted into evidence after the State failed to produce the first videotape.

---

[1] The custodial interrogation occurred before defendant was indicted or adversary criminal proceedings were otherwise begun. Thus, defendant's sixth amendment right to counsel had not yet arisen. (*Edwards* v. *Arizona* (1981), 451 U.S. 477, 480 n.7, 68 L. Ed. 2d 378, 383 n.7, 101 S. Ct. 1880, 1883 n.7.) However, his fifth amendment right to counsel as identified in *Miranda* existed during the custodial interrogation. (*Edwards* v. *Arizona* (1981), 451 U.S. 477, 481-82, 68 L. Ed. 2d 378, 384, 101 S. Ct. 1880, 1883; see *People* v. *White* (1975), 61 Ill. 2d 288, 294-95, 335 N.E.2d 457, 461-62.) For a discussion of the distinction between one's fifth amendment and sixth amendment rights to counsel, see *Wyrick* v. *Fields* (1982), ... U.S. ....., ..., 74 L. Ed. 2d 214, 222-23, 103 S. Ct. 394, 399-400 (Marshall, J., dissenting).

Defendant admits shooting and killing Anthony Taylor while Taylor was in the back seat of an automobile. According to defendant, at the time of the shooting, he was leaning into the automobile and struggling with Taylor. Defendant claims that during the struggle Taylor threatened to kill him and that Taylor drew a gun and aimed it at him. Defendant also claims that, in fear for his life, he drew his own gun and killed Taylor. After the shooting, defendant fled the scene.

The homicide occurred in Brookfield, Illinois, at about 7 p.m. on Friday, June 23, 1978. Later that evening, defendant was arrested in Chicago on a speeding charge for traveling 60 miles per hour in a 55-mile-per-hour zone. He was asked to take a breathalyzer test, and he refused on the basis that he wanted to see his attorney first. He was then taken, without further interrogation, to a police station in Chicago where he remained locked up for about 12 hours. On Saturday afternoon, he was taken to the county jail, where he remained until Sunday afternoon. At about 5 p.m., three Brookfield police officers appeared at the county jail. One of them advised defendant that he was wanted in connection with the homicide that occurred in Brookfield. The officer gave defendant *Miranda* warnings, and defendant's response, as reflected by his uncontradicted testimony, was as follows:

> "A. I told them that my people will have a lawyer out there. Probably Monday because today is Sunday and I don't think I can reach my lawyer on a Sunday.
>
> Q. At that point. They simply told you the rights, you answered saying that you didn't know if you could get your lawyer because it was on a weekend or Sunday?
>
> A. Sunday afternoon, right.
>
> Q. And but that your family would be producing a lawyer over at the police station, is that correct.
>
> A. Right.

Q. Was anything else said at that point ***?
A. No."

The Brookfield police officers then took defendant to the Brookfield police station, where they arrived at about 7 p.m. At the police station, defendant was taken into a conference room and given *Miranda* warnings again. According to his uncontradicted testimony, defendant responded: "I would really not say anything until I have my lawyer." Thus, within a few hours at most, defendant had been given *Miranda* warnings at least twice, and on each occasion he asserted his constitutional right to counsel.

At that stage, an assistant State's Attorney, the supervisor in charge of felony review, arrived at the police station. According to his testimony, he ascertained that defendant "had been advised of his rights by the police officers per the Miranda Decision." Then, for no stated reason, he readvised defendant of "the same rights," and he resumed the interrogation of defendant.

The record indisputably manifests that the resumption of defendant's interrogation was not in any way initiated by defendant. It was plainly not at defendant's suggestion or request. According to the testimony of the assistant State's Attorney at the suppression hearing, here is what happened:

> "Q. After giving the defendant his Miranda Rights and determining that he had been given those rights by the police officers what was the next conversation you had with the defendant?
> A. I asked him if he wanted to make a statement at this time to me. ***".

The assistant State's Attorney testified that defendant then stated that he would tell him what happened because he had been treated like a man. The assistant State's Attorney asked defendant if he wanted to see his lawyer first, and defendant replied. "[N]o, I'll tell

you what happened now." Defendant then gave the assistant State's Attorney a statement and he reenacted the homicide. At the assistant State's Attorney's request, defendant reenacted the homicide again on videotape. The assistant State's Attorney told defendant that the video tape did not come out, and defendant agreed to videotape a reenactment a second time. The assistant State's Attorney showed defendant that nothing appeared on the screen when the first videotape was replayed. The assistant State's Attorney and defendant testified that the second taping was about the same as the first. However, the assistant State's Attorney also testified that the reenactment for the first videotape "was the best." He testified that defendant was "more graphic and vivid" than he was in the reenactment for the second videotaping.

During pretrial proceedings, the State produced only the second videotape because, it claimed, it did not keep the first videotape. Defendant filed a motion to suppress the second videotape, which was denied. During the trial, the second videotape was admitted into evidence and played before the jury.

We conclude that the trial court erred in denying defendant's motion to suppress and in admitting the videotape into evidence. Since defendant had plainly invoked his right to counsel, the resumption of the custodial interrogation solely at the initiative of the assistant State's Attorney without defendant's counsel being present was a *per se* violation of the fifth amendment to the Constitution.[2] Therefore, all subsequent

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[2] There is a significant distinction between the safeguards triggered by a request to remain silent and the assertion of one's right to counsel. There is no *per se* proscription of any subsequent further attempt to interrogate if the person being questioned has merely indicated a desire to remain silent. However, the interrogation must cease and cannot be subsequently resumed at the initiative of the State until an attorney is present

confessions, inculpatory statements and inculpatory videotape reenactments of the homicide which occurred before defendant had access to counsel were nullified and should not have been used as evidence against defendant. (See *Edwards* v. *Arizona* (1981), 451 U.S. 477, 484-86, 68 L. Ed. 2d 378, 386-87, 101 S. Ct. 1880, 1884-85; *White* v. *Finkbeiner* (7th Cir. 1982), 687 F.2d 885; see also *Stumes* v. *Solem* (8th Cir. 1982), 671 F.2d 1150, *cert. granted* (1983), ... U.S. ....., 77 L. Ed. 2d 1409, 103 S. Ct. 3568.) In *Edwards* the court stated:

> "*Miranda* itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present.' 384 U.S., at 474. *** In *Fare* v. *Michael C., supra,* at 719, the Court referred to *Miranda's* 'rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease.' And just last Term, in a case where a suspect in custody had invoked his *Miranda* right to counsel, the Court again referred to the 'undisputed right' under *Miranda* to remain silent and to be free of interrogation 'until he had consulted with a lawyer.' *Rhode Island* v. *Innis,* 446 U.S. 291, 298 (1980). *We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.*" (Emphasis added.) 451 U.S. 477, 485, 68 L. Ed. 378, 386-87, 101 S. Ct. 1880, 1885.

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[2] (Continued)

if the person clearly asserted his right to counsel. Compare *Edwards* v. *Arizona* (1981), 451 U.S. 477, 484-86, 68 L. Ed. 2d 378, 386-87, 101 S. Ct. 1880, 1884-85, with *Michigan* v. *Mosley* (1975), 423 U.S. 96, 101-04, 46 L. Ed. 2d 313, 320-21, 96 S. Ct. 321, 325-26.

In the present case, had defendant himself initiated his meeting and conversation with the assistant State's Attorney, nothing in the fifth amendment would have prohibited the assistant State's Attorney from merely listening to or recording defendant's voluntary, volunteered statement or reenactments of the homicide and using them against him at trial. (*Edwards* v. *Arizona* (1981), 451 U.S. 477, 485, 68 L. Ed. 2d 378, 387, 101 S. Ct. 1880, 1885.) But that is not what the facts in this case show. Rather, this case is squarely on all fours with *Edwards,* where the court stated:

> "Here, the officers conducting the interrogation on the evening of January 19 ceased interrogation when Edwards requested counsel as he had been advised he had the right to do. The Arizona Supreme Court was of the opinion that this was a sufficient invocation of his *Miranda* rights, and we are in accord. It is also clear that without making counsel available to Edwards, the police returned to him the next day. *This was not at his suggestion or request.* Indeed, Edwards informed the detention officer that he did not want to talk to anyone. At the meeting, the detectives told Edwards that they wanted to talk to him and again advised him of his *Miranda* rights. Edwards stated that he would talk, but what prompted this action does not appear. He listened at his own request to part of the taped statement made by one of his alleged accomplices and then made an incriminating statement, which was used against him at his trial. We think it is clear that Edwards was subjected to custodial interrogation on January 20 within the meaning of *Rhode Island* v. *Innis, supra,* and that this occurred at the instance of the authorities. His statement, made without having had access to counsel, did not amount to a valid waiver and hence was inadmissible." (Emphasis added.) 451 U.S. 477, 486-87, 68 L. Ed. 2d 378, 387-88, 101 S. Ct. 1880, 1886.

In the present case, not only are the principles established in *Edwards* applicable, but the present case also plainly demonstrates why such principles are necessary and must be judicially enforced. Here, although the assistant State's Attorney knew that defendant had been given *Miranda* warnings and that he had been repeatedly asserting his constitutional right to counsel before being interrogated, the assistant State's Attorney again advised defendant of his constitutional rights and then asked defendant if he wanted to *give him* a statement.

No reason is given why it was necessary within a matter of two hours to readvise defendant of his right to remain silent and his right to counsel. The only apparent reason that the assistant State's Attorney readvised defendant of his rights was to euchre a waiver of defendant's constitutional right to counsel. See *Edwards* v. *Arizona* (1981), 451 U.S. 477, 487, 68 L. Ed. 2d 378, 387-88, 101 S. Ct. 1880, 1886; *Brewer* v. *Williams* (1977), 430 U.S. 387, 399, 51 L. Ed. 2d 424, 436-37, 97 S. Ct. 1232, 1240.) Plainly, one's constitutional right to counsel during custodial interrogation cannot be so tenuous that it can be circumvented by the ploy of having an array of personalities repeatedly give *Miranda* warnings to a suspect who has asserted his right to counsel until the suspect has a different reaction to a particular, perhaps more sophisticated, interrogator and gives a different response. Rather, we believe that one's constitutional right to counsel during custodial interrogation is so substantial that once a suspect asserts his right to counsel, the State cannot on its own initiative readvise him of his rights to remain silent or to counsel unless it has some demonstrable and valid reason for doing so, and if it has none, then any subsequent inculpatory statement or recording by the suspect before he has access to counsel would be unconstitutionally obtained. (See *Edwards* v. *Arizona* (1981), 451 U.S. 477, 484-87, 68 L. Ed. 2d 378, 386-88, 101 S. Ct. 1880, 1884-86; *Oregon* v. *Bradshaw* (1983), ... U.S. ....., ..., 77 L. Ed. 2d 405, 411, 103 S. Ct. 2830, 2834.)

We also believe that once a person requests counsel during custodial interrogation, he may not be reinterrogated at the initiative of the State as to any related or unrelated offense until an attorney is present. (*State* v. *Routhier* (1983), 137 Ariz. 90, ..., 669 P.2d 68, 74-76; *Offutt* v. *State* (1983), ... Md. App. ....., ..., 467 A.2d 194, 195.) Constitutional rights should not be the subject of gamesmanship. Nor should they be the subject of an endurance test.

Moreover, we, as judges, must be most circumspect when it appears that a dissimulation[3] has been employed to deprive a person of his right to counsel, for those affected are invariably the poorest, the weakest and the least educated, who are not sophisticated enough to realize the protection afforded by the great rights and guarantees of our constitution. If our constitutional rights and guarantees are to be in fact enjoyed equally by all our citizens, we, as judges, must ensure that those suspected of crimes do not relinquish their constitutional rights and guarantees solely because they become matched up against a more sophisticated but uncaring law enforcement officer, or an overzealous assistant State's Attorney who may be bent on obtaining a conviction without regard to the suspect's constitutional rights and guarantees. In this regard, we should bear in mind that "'*** the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of "persuasion."'" *Brewer* v. *Williams* (1977), 430 U.S. 387, 408, 51 L. Ed. 2d 424, 442, 97 S. Ct. 1232, 1244 (Marshall, J., concurring), quoting *Blackburn* v. *Alabama* (1960), 361 U.S. 199, 206, 4 L. Ed. 2d 242, 247-48, 80 S. Ct. 274, 279.

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[3] In a custodial setting, the use of ploys and other techniques of persuasion, no less than express questioning, amounts to interrogation. *Rhode Island* v. *Innis* (1980), 446 U.S. 291, 299, 64 L. Ed. 2d 297, 306-07, 100 S. Ct. 1682, 1688-89; set *Stumes* v. *Solem* (8th Cir. 1982), 671 F.2d 1150, *cert. granted* (1983), ... U.S. ....., 77 L. Ed. 2d 1409, 103 S. Ct. 3568.

Here, defendant was a 41-year-old black high school dropout who had repeatedly asserted his constitutional right to counsel during custodial interrogation. By resuming the custodial interrogation and making defendant feel "like a man," the assistant State's Attorney was able to get defendant to reenact the homicide on three separate occasions, and he videotaped two of the reenactments for subsequent use against defendant at trial. All this took place on a Sunday evening without defendant's counsel being present after defendant had told police that "my people will have a lawyer out there. Probably Monday because today is Sunday and I don't think I can reach my lawyer on a Sunday."[4]

We can neither affirm nor condone what was done by the assistant State's Attorney in this case because we believe that he violated defendant's fifth amendment right to have counsel present during custodial interrogation, and that he took advantage of the constitutional violation by expeditiously conducting videotaped reenactments of the homicide before defendant had access to counsel. What occurred contravenes the constitutional rights of the accused as set forth in *Edwards,* and it is inimical to the basic dictates of a fair criminal justice system. As for the State's claim that defendant waived his constitutional right to counsel, that claim is untenable. The statements relied upon by the State, which appear earlier in this opinion, were made by defendant in conjunction with a resumed custodial interrogation initiated solely by the assistant State's Attorney without defendant having had access to counsel after he had clearly and repeatedly asserted his right to counsel. (See *Edwards* v. *Arizona* (1981), 451 U.S. 477, 484-87, 68 L. Ed. 2d 378, 386-88, 101 S. Ct. 1880, 1884-86.) Waiver is simply not involved in this case. See *Oregon* v. *Bradshaw* (1983), ... U.S. ....., ..., 77 L. Ed. 2d 405, 412, 103 S. Ct. 2830, 2834-35.

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[4] The notice give [sic] to the police is imputed to the assistant State's Attorney. See *People* v. *White* (1975), 61 Ill. 2d 288, 294, 335 N.E.2d 457, 461.

Accordingly, we conclude that defendant's conviction must be reversed and defendant granted a new trial in which the State is precluded from taking advantage of all matters that occurred in the absence of defendant's counsel from the first time that defendant exercised his constitutional right to counsel before the police officers.

In addition, we conclude that defendant's conviction must be reversed and the case remanded for a new trial because of the admission of the second videotape into evidence after the State failed to produce the first videotape, which was requested by defendant's counsel. On this point, we should bear in mind that defendant admits committing the homicide. The question is whether the homicide was murder, voluntary manslaughter or self-defense.

In this regard, a seasoned attorney would know that an expression of fear, excitement or calmness, or an inadvertent or thoughtless, casual leaning or placement of one's body in a certain way during the reenactment of a homicide could be the crucial difference between a finding of murder, voluntary manslaughter or self-defense. Therefore, we find it significant that the only attorney who was present during the two videotapings of the reenactments of the homicide was the assistant State's Attorney, and he did not keep the first tape because, he claims, it did not come out. His action, of course, meant that the first videotape would not be available later for examination by defendant's counsel.

We believe that the assistant State's Attorney, who was in charge of felony review, should have been aware of the potential importance of the first tape. The State's explanation for the unavailability of the missing tape is simply too convenient an excuse in a case where one's liberty is at stake. Moreover, we do not feel that the significance of the missing tape is diminished by statements that defendant was shown the tape that Sunday evening or by the testimony that the two tapings were about the same, since the record establishes that defen-

dant did not know anything about cameras or videotapes. Indeed, the fact that defendant did not have any knowledge of cameras or videotapes demonstrates one of the reasons why it was so important that defendant have had access to counsel prior to the tapings. Ours is an adversary criminal justice system, and we should not pretend that it is otherwise. The stark realities of our adversary criminal justice system are such that what occurs within the confines of a police station during custodial interrogation when the suspect does not have an attorney present is not always what the unsophisticated would expect. See *Miranda* v. *Arizona* (1966), 384 U.S. 436, 448-58, 16 L. Ed. 2d 694, 708-14, 86 S. Ct. 1602, 1614-19; *Brewer* v. *Williams* (1977), 430 U.S. 387, 399, 51 L. Ed. 2d 424, 436-37, 97 S. Ct. 1232, 1240.

Under the circumstances, we believe that the State was charged with the safekeeping of the first tape, and that it was not for the assistant State's Attorney on that Sunday evening in the police station to determine whether there was anything on the first tape which would have been beneficial to defendant. Since the State was charged with the safekeeping of both tapes and it did not fulfill its obligation, the State, rather than defendant, should suffer the consequences of its negligent or wilful destruction of the missing tape. Accordingly, we conclude that the State should have been precluded from putting the second tape into evidence. It is unrealistic to believe that any lesser restraint upon the State would have any meaningful effect.

For the reasons stated, we reverse the conviction and remand the case for a new trial. We do not reach the other issues raised by the defendant except the issue of whether the evidence admitted at trial was sufficient for a jury to conclude that defendant was guilty beyond a reasonable doubt. We have reviewed all of the evidence, and we conclude that the evidence admitted at trial was sufficient for a jury to conclude that defendant was guilty

beyond a reasonable doubt. This does not mean that we are making a finding as to defendant's guilt or innocence which will be binding on retrial, but rather, our consideration of the sufficiency of the evidence admitted at trial will protect defendant's constitutional right against double jeopardy. See *People* v. *Taylor* (1979), 76 Ill. 2d 289, 309-10, 391 N.E.2d 366, 375.

Accordingly, the judgment is reversed, and this case is remanded for a new trial.

Reversed and remanded.

McNAMARA and McGILLICUDDY, J.J., concur.

APPENDIX B

FINDINGS OF TRIAL COURT ON MOTION TO SUPPRESS

IN THE CIRCUIT COURT OF THE
COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,

vs.

JAMES HAMMOCK,
Defendant.

78 C 3544

MOTION

REPORT OF PROCEEDINGS of the motion before the Honorable ANTHONY J. BOSCO, on the 17th day of January, 1980.

APPEARANCES:

HONORABLE BERNARD CAREY,
State's Attorney of Cook County,
by MS. CAROL KEARNEY,
Assistant States' Attorney, for the
People of the State of Illinois
MR. CHESTER BLAIR,
for the Defendant.

THE COURT: Thank you, Mr. Blair for your excellent presentation, Miss Kearney, the presentation on both sides relevant to this. both have been most lucid, intelligent and energetic. That's appreciated by this Court.

The motion is a very interesting one. The subject matter is in my opinion probably going to be the subject matter of many, many various motions and proceedings in the future.

I welcome this opportunity to pass upon this question at this time, particularly under these circumstances.

When I have so much help from the lawyers who are involved.

Mr. Hammock took the stand, took the oath and testified and in my opinion for whatever it is worth at least for this motion, Mr. Hammock was very straightforward, sincere, most pleasant and in general a very believeable and persuasive witness.

He was, if I might say, likeable. On the stand his attitude was good, he was not evasive and in my opinion attempted to paint a picture of the truth as he sees it.

And that is not only noted for this record, but is noted with my appreciation.

The Assistant State's Attorney, Mr. Hartman, took the same oath, took the same stand and in my opinion for whatever it is worth, was equally sincere, straightforward intent and in general very competent.

The testimony in the manner of testimony is still the conflict of the subject matter. And I appreciate that. There is not too much conflict.

In the testimony there is some conflict that conflict occurs in my opinion because both witnesses were as I said before, attempting to be scrupulous relative to the telling of and establishing of the truth.

And that's the way I see it. Relative to the particular legalities involved I have no reason to disbelieve the defendant when he states that the police involved were scrupulously aware of his rights at all times.

I believe everything he said regarding that. And I, in fact, I'm happy that he — that he relates it in the manner that he relates it.

I think, he was, he was glad to be able to say those things. And that's appreciated.

The question of the attorney that is Mr. Hartman being agreeable, being professional, being expert, we should comment on that.

He is an officer of the Court, such as Mr. Hartman, not only should be agreeable, but in my opinion, the ethics established that he has a duty to be agreeable. He has no duty to be disagreeable.

He should avoid that as all court officers do. By agreeable, I don't want any creating of misunderstandings.

The lawyer, of course, has a right to disagree as vigorously as is within his capabilities and energies. A lawyer has no right to be disagreeable.

There is quite a difference. The question of the writing being thrown away. I have no reason to disbelieve Mr. Hartman when he states in the manner and form that he did that that is exactly what he did.

I find that as a finding of fact that's exactly what he did. People do that. Lawyers do that. Police officers do that. Nothing states that that is required. That he's required not to do that.

This thing about the tape. That preserving that videotape. I agree with Mr. Blair. The better procedure would have been to preserve that tape that didn't come out.

I believe that if I were Mr. Blair I would be arguing exactly in the manner and to the intensity that he argued.

And relative to that point I think, he's absolutely right. The best procedure would have been to preserve that tape even if it were blank. But if that procedure is not followed, in other words, if the best of procedure is not followed does that invalidate any subsequent or perhaps second best procedure.

Well, the law says, no. The law says that unless there is a particular prejudice that can be demonstrated at this time in this motion before his finder of fact relative to

the motion, I can't invalidate the presentation of a second tape, not under the circumstances as I understand them.

The question of the editing. There was no evidence of editing. I would suppress this in a moment. The editing goes contra to all my understanding of fair procedure.

I might advise you gentleman and lady, that some nine or ten years ago Alan E. Morrill, now Judge Morrill and now Judge Bosco, this is before I ascended the bench, were instrumental in devising the first taped, videotaped depositions. We were involved in an extended and protracted litigation relative to certain substantial claims and we devised the videotape depositions procedure and it was a great help. Great help to us, great help to the Court and we never had a problem with it.

We were scrupulous in our avoidance of any editing at the depositions. And though we are not professionals as Mr. Hartman and the police officers they are probably not tape professionals, videotape technicians, but they can observe common sense rules.

Let's talk about common sense for one moment relative to this motion. If I were to conclude that only the best procedures would have any piece of evidence gained admittance into any record then, I think, this Court would be severely limiting the emergence of the truth in any situations.

Each of us, Mr. Blair and Miss Kearney would like the best of every possible type of evidence because we believe in our causes. And that's good. Human nature being what it is it's impossible.

A film versus a videotape. What about that. We all know that moving films, moving pictures films are perfectly proper for admittance into evidence under certain circumstances. If that is the case I see no difference between a movie film or a videotape film, photographs.

What is the essential difference between a photograph and video film? No judge is present. Usually no judge or lawyer is present when certain photographs are taken to preserve evidence or to become evidence. And that the Court under certain safeguards will allow those pieces of evidence into evidence and improperly so.

Videotape cameras in banks are common. It's for security purposes. Evidence, the videotapes, films, if you will are used and are being presently used in substantial litigations.

The Patty Hearst-Tania case relative to bank activities. We can all recall that.

In many other instances. If the law is not going to be progressive, if we are too frightened that the lawyers and myself, if we are too frightened or afraid of new things then I fear all of us will eventually suffer. Progress must be made, not only in the technology of industry, but also in the technology of the criminal justice system.

I welcome that progress. I find no essential prejudice to the defendant relative to the particular manners of accumulating the evidence complained of in the motion to suppress the videotape, namely, or the statements.

Mr. Hartman as I said, illustrated his professionalism and exhibited what, I think, is an admirable dedication of sense of justice and fair play and for that not only I but all persons should thank him and we do.

I'm going to deny this motion because I can't find any real legitimate legal reason for granting it. If I were in doubt, if I were in doubt, any real doubt, I would resolve this motion in favor of Mr. Hammock because that's my duty.

But I'm comfortable with the decision. I'm not bothered in the least. And I can assure the defendant of that. The motion is appreciated.

And constructive, but it's denied at this point.

APPENDIX C

ORDER OF THE ILLINOIS SUPREME COURT DENYING LEAVE TO APPEAL

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

June 5, 1984

Hon. Richard M. Daley
Cook County State's Attorney
Criminal Appeals Section
574 Richard J. Daley Center
Chicago,. IL 60602

No. 59887 - People State of Illinois, petitioner, vs. James Hammock, Jr., respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today *DENIED* the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 27, 1984.

ORIGINAL

Supreme Court, U.S.
FILED
OCT 1 1984
ALEXANDER L. STEVAS
CLERK

No. 84-177

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

-vs-

JAMES HAMMOCK, JR.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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10.4

TABLE OF CONTENTS

	Page
Statement of Case	1
Summary of Argument	2
Argument	3
I. IT IS UNNECESSARY FOR THE COURT TO GRANT A WRIT OF CERTIORARI TO DECIDE THE ISSUE OF THE RETROACTIVITY OF EDWARDS V. ARIZONA BECAUSE RESPONDENT IS ENTITLED TO SUPPRESSION OF THE VIDEOTAPE PURSUANT TO PRE-EDWARDS CASE LAW	3
II. CERTIORARI SHOULD NOT BE GRANTED SINCE THE JUDGMENT IS SUPPORTED BY AN INDEPENDENT GROUND OF STATE LAW	7
Conclusion	7

TABLE OF AUTHORITIES

	Page
Miranda v. Arizona, 384 U.S. 436 (1966).....	3
Edwards v. Arizona, 451 U.S. 477 (1981).....	3
Michigan v. Mosley, 423 U.S. 96 (1975).....	3
Solem v. Stumes, 79 L. Ed. 2d 579 (1984).....	3
Maryland v. Baltimore Radio Show, 338 U.S. 914 (1949)..	7
People v. Medina, 71 Ill. 2d 254, 375 N.E. 2d 78 (1978).....	5
People v. Washington, 68 Ill. 2d 186, 369 N.E. 2d 57 (1977).....	5
People v. Taylor, 61 Ill. App. 3d 37, 377 N.E. 2d 838 (2nd Dist. 1978), aff'd, 76 Ill. 2d 289, 391 N.E. 2d 366 (1979).....	5
People v. Hammock, 121 Ill. App. 3d 874, 460 N.E. 2d 378 (1st Dist. 1984).....	7

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STATEMENT OF THE CASE

James Hammock, Jr. was charged and convicted of the murder of Anthony Taylor. His defense at trial was self-defense. The shooting occurred in a car parked in a liquor store parking lot. The driver of the car testified he exited the car when a "scuffle" started between Hammock, who was standing outside of the car, and Taylor, who was seated in the back seat of the car, and he observed Hammock "come out of his pocket" with a brown object. (R. 603) The prosecution produced no actual eyewitness to the shooting but introduced a videotape in which Hammock described and demonstrated the events of the shooting to Assistant State's Attorney Hartman.

Prior to trial Hammock moved to suppress that videotape as evidence. He testified in support of the motion that he was arrested by the Chicago police on June 23, 1978 for a traffic offense and at that time told the police he would like to see his lawyer. (R. 3,4) He was held at a police station for twelve hours and then taken to the House of Correction where the next day he was arrested by the Brookfield police on a homicide charge. (R.4,5) When advised by those officers of his right to counsel at the House of Correction, Hammock's uncontradicted

testimony was that he told them that his people would have a lawyer at the police station but that the lawyer probably could not get out there until the following day because it was a Sunday and he didn't think he could reach his lawyer on a Sunday. (R. 12)

Assistant State's Attorney Hartman testified that he saw Hammock after he had been transported to the Brookfield police station. He ascertained that Hammock had been advised of his rights by the police and then readvised Hammock of his rights himself. (R 63) When he asked Hammock if he wanted to make a statement, Hammock said he did not and that he wanted a lawyer. Hartman asked him who his lawyer was and when Hammock mentioned Mr. Blair, Hartman told him he could call Blair if he wanted to. Hammock indicated he didn't know the number. Hartman obtained Blair's number for Hammock. (R. 65) Hammock commented that he had been treated like a man and he had expected rough treatment. Hartman told him there was no reason to expect that, that it wasn't supposed to be done. Hartman testified Hammock said, "I'll tell you what happened." Hartman asked him if he wanted to have his lawyer present and Hammock said, "No, I'll tell you what happened right now." (R. 66) However, Hammock testified he made a statement because the prosecutor led him to believe he was friendly with his lawyer and he would most likely get probation. (R. 33, 44)

The trial court denied Hammock's motion to suppress but the Appellate Court reversed on the ground that the statement had been obtained in violation of Hammock's fifth amendment right to have counsel present during interrogation and because the prosecution had failed to preserve and produce a videotape on which Hammock's initial statement had been recorded.

SUMMARY OF ARGUMENT

This is not an appropriate case to decide the question left unresolved in Solem v. Stumes, 79 L. Ed. 2d 579 (1974), i.e., whether the rule pronounced in Edwards v. Arizona, 451 U.S. 477 (1981) should be applied to cases which were not yet final when Edwards was decided, because respondent was entitled to

suppression of the videotape under pre-Edwards case law, petitioner contends no Edwards violation occurred, and the Appellate Court ruled that the statement should have been suppressed for reasons independent of the Edwards violation, which have not been questioned by petitioner in this Court.

ARGUMENT

I. IT IS UNNECESSARY FOR THIS COURT TO GRANT A WRIT OF CERTIORARI TO DECIDE THE ISSUE OF THE RETROACTIVITY OF EDWARDS V. ARIZONA, BECAUSE RESPONDENT IS ENTITLED TO SUPPRESSION OF THE VIDEOTAPE PURSUANT TO PRE-EDWARDS CASE LAW.

In Miranda v. Arizona, 384 U.S. 436 (1966) this Court held that if an individual, after having been advised of his rights, states he wants an attorney, the interrogation must cease until an attorney if present. If the individual cannot obtain an attorney and indicates that he wants one before speaking with the police, they must respect his decision to remain silent. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel 384 U.S. 474, 475. Respondent submits that application of these principles to the facts of the case at bar leads to the conclusion that the videotape should have been suppressed and thus it is inappropriate and unnecessary for this Court to grant a writ of certiorari to decide whether respondent was entitled to relief pursuant to Edwards v. Arizona, 451 U.S. 477 (1981).

While expressly noting in Michigan v. Mosely, 423 U.S. 96, 103 n. 10 (1975) that the procedural safeguards triggered by a request to remain silent and a request for an attorney are different, this Court held in Solem v. Stumes, 79 L. Ed. 2d 579, 590 (1984) that much of the logic and language of Mosely could be applied to invocation of the right to counsel. In Mosely, defendant was arrested for robbery and, upon being advised of his Miranda warnings, exercised his right to remain silent.

Interrogation ceased immediately and defendant was taken to a cell. A few hours later a different officer removed defendant from the cell and questioned him regarding an unrelated homicide after advising defendant of his rights. Defendant did not assert during this interrogation that he desired to consult with counsel or indicate he did not want to discuss the homicide. This Court stated that the admissibility of defendant's statement so obtained depends on whether his right to cut off questioning was "scrupulously honored" and concluded it had been because the first officer had immediately ceased interrogation upon being advised that defendant did not want to be questioned and made no attempt to resume questioning, after a significant time interval defendant was questioned by a different officer about an unrelated offense, and prior to that second interrogation defendant was fully advised of his rights and chose not to exercise them. The fact that the police had not failed to honor defendant's decision to remain silent by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind was found to be significant. 423 U.S. 105, 106.

By contrast, in the case at bar the facts demonstrate that the prosecution did not scrupulously honor respondent's invocation of his right to counsel but persisted in repeated efforts to wear down his resistance and make him change his mind. Respondent had advised both the Chicago and Brookfield police of his desire for counsel. After invoking his right to counsel when given the warnings by the Brookfield police, those officers took respondent into their custody from the House of Correction and transported him to the Brookfield police station where he was confronted by Assistant State's Attorney Hartman. There is no evidence of any significant time lapse between respondent's exercise of his right to counsel and his interrogation by Hartman. The prosecution was aware that respondent wanted counsel present prior to any questioning and that respondent did not believe it possible that he could contact his counsel on that day, a Sunday, yet Hartman initiated an interview with respondent. Respondent was not questioned about a separate

unrelated crime but for the same offense for which he had been arrested by the Brookfield police and regarding which he had declined to make a statement without counsel. As the Illinois Appellate Court noted, the ploy was to have an array of personalities repeat the Miranda warnings to respondent until he had a different reaction to a particular, perhaps more sophisticated interrogator and agreed to make a statement. 460 N.E. 2d 382. It would indeed be ironic if the prosecution were permitted to use their duty to advise an accused of his rights to engage in the kind of psychological persuasion the warnings were intended to eliminate.

Decisions of the Illinois Supreme Court support the conclusion that respondent's statement would have been held inadmissible prior to this Court's decision in Edwards. See People v. Medina, 71 Ill. 2d 254, 375 N.E. 2d 78 (1978) (statement suppressed where defendant arrested between 2 and 3:00 a.m., taken to a police station and advised of his rights; defendant asked for an attorney and interrogation ceased until 8:00 a.m. when defendant interrogated by another officer and made a statement); People v. Washington, 68 Ill. 2d 186, 369 N.E. 2d 57 (1977) (defendant arrested at 9:00 p.m., advised of his rights and made statement; at 1:00 a.m. placed in a cell and when advised of rights at 9:30 a.m. asked for counsel but his attempts to reach counsel were unsuccessful; at 5:30 p.m. he was advised of his rights and said he did not want to make a statement but wanted to talk to a priest and psychiatrist; after talking with the police chaplain defendant made a statement after stating he understood his rights; statement held inadmissible); People v. Taylor, 61 Ill. App. 3d 37, 377 N.E. 2d 838 (2nd Dist. 1978), aff'd, 76 Ill. 2d 289, 391 N.E. 2d 366 (1979) (statement made by defendant on day after requests for counsel ignored held inadmissible even though defendant did not request counsel after being advised of his rights before giving statement).

Curiously, while asking this Court to grant a writ of certiorari to decide whether Edwards should have any retrospective application, the petitioner devotes a large portion of its argument to the contention that no Edwards violation occurred.

(Petition, pp. 9, 10) It appears anomolous for petitioner to ask this Court to take this case to decide a question which it does not contend is presented by the facts of the case. The petitioner's position, that even were Edwards applied retrospectively to cases on direct review respondent is entitled to no relief from his conviction, should persuade this Court that the present case is not an appropriate one to decide the sole question posed by petitioner.

II. CERTIORARI SHOULD NOT BE GRANTED SINCE THE JUDGMENT IS SUPPORTED BY AN INDEPENDENT GROUND OF STATE LAW.

If a decision of a state court can be sustained on an independent ground of state law, it is not subject to review by this Court even though the court also passed on issues of federal law. Maryland v. Baltimore Radio Show, 338 U.S. 912, 918 (1949). The Illinois Appellate Court reversed respondent's conviction and remanded for a new trial on the ground that respondent's videotaped statement and demonstration was erroneously admitted. It found the admission erroneous not only because the statement was obtained in violation of respondent's fifth amendment right to have counsel present at the interrogation but because the prosecution failed to produce the first videotape which had been requested by defense counsel. People v. Hammock, 121 Ill. App. 3d 874, 460 N.E. 2d 378,384 (1st Dist. 1984). The Appellate Court relied on no provision of federal law or the Constitution to support this result. Petitioner has not sought review of this portion of the Appellate Court's decision in this Court. Even if this Court would agree that the videotape was not subject to suppression pursuant to Edwards, respondent would nonetheless be entitled to the relief awarded by the Appellate Court on an alternative ground.

CONCLUSION

Respondent, James Hammock, Jr., prays that this Court deny the petition for writ of certiorari to the Appellate Court of Illinois, First District.

Respectfully submitted,

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No. 84-177

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,
vs.
JAMES HAMMOCK, JR.,

Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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TABLE OF CONTENTS

Argument 1

I.

IT IS NECESSARY FOR THIS COURT TO REVIEW THE ILLINOIS APPELLATE COURT'S ERRONEOUS RETROACTIVE APPLICATION OF EDWARDS V. ARIZONA, AND MIS-APPLICATION OF THE EDWARDS DECISION, WHERE THE EDWARDS DECISION IS PROPHYLACTIC IN NATURE AND WHERE THE LAW ENFORCEMENT OFFICALS INVOLVED IN THE INSTANT CASE ACTED REASONABLY AND IN ACCORDANCE WITH EXISTING DECISIONS OF THIS AND OTHER COURTS..... 1

II.

THE ILLINOIS APPELLATE COURT ERRONEOUSLY CONCLUDED THAT A VIDEOTAPE OF RESPONDENT'S STATEMENT WAS IMPROPERLY INTRODUCED INTO EVIDENCE ALTHOUGH THE VIDEOTAPE OF AN EARLIER ATTEMPT TO RECORD RESPONDENT'S STATEMENT WAS NOT PRODUCED SINCE THERE IS NO EVIDENCE OF, NOR SUGGESTION OF, WRONGDOING ON THE PART OF THE STATE AND SINCE BOTH THE STATE AND RESPONDENT AGREED THAT THE STATEMENT MADE IN THE SECOND VIDEOTAPE WAS VIRTUALLY THE SAME STATEMENT AS THAT MADE DURING THE FIRST VIDEOTAPING EFFORT AND WHERE BOTH STATEMENTS WERE VIRTUALLY THE SAME AS RESPONDENT'S INITIAL ORAL STATEMENT..... 11

Conclusion 18

TABLE OF AUTHORITIES

Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981)	2,3,4, 5,9,10 16,17
Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938)	8
Oregon v. Bradshaw, 103 S.Ct. 2830 (1983) .	6,7
People v. Ash, 16 Ill. App.3d 633, 306 N.E.2d 319 (2d Dist. 1974)	15
People v. Jiles, 13 Ill. App.3d 245, 300 N.E.2d 803 (1st Dist. 1973)	14
People v. Utinans, 55 Ill. App.3d 306, 370 N.E.2d 1080 (1st Dist. 1978)	14,15
Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682 (1980)	9
Solem v. Stumes, 104 S.Ct. 1338 (1984)	3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

JAMES HAMMOCK, JR.,

Respondent.

IT IS NECESSARY FOR THIS COURT TO REVIEW THE ILLINOIS APPELLATE COURT'S ERRONEOUS RETROACTIVE APPLICATION OF EDWARDS V. ARIZONA, AND MIS-APPLICATION OF THE EDWARDS DECISION, WHERE THE EDWARDS DECISION IS PROPHYLACTIC IN NATURE AND WHERE THE LAW ENFORCEMENT OFFICALS INVOLVED IN THE INSTANT CASE ACTED REASONABLY AND IN ACCORDANCE WITH EXISTING DECISIONS OF THIS AND OTHER COURTS.

Respondent contends that it is unnecessary for this Court to review whether this Court's decision of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981), should be applied retroactively claiming that respondent is entitled to suppression of his statement confessing to murder, including a videotape of that confession, pursuant to pre- Edwards case law. A review of the facts in the instant case reveals that respondent was not interrogated after he requested counsel but that he was allowed to make a statement after respondent later decided to make a statement without the presence of his attorney, subsequent to being provided with his requested attorney's telephone number and before making any attempt to contact his attorney.

Respondent in his brief chooses not to discuss the appropriateness of retroactive

application of Edwards, upon which the Illinois Appellate Court relied in reversing respondent's conviction of murder, and relies instead upon a claim that pre-Edwards case law supported reversal. Certainly the traditional factors utilized in determining whether a decision should receive retroactive application, which are set forth in the State of Illinois' petition, militate against a retroactive application of Edwards. As this Court indicated in Solem v. Stumes, 104 S.Ct. 1338, 1343 (1984),

> The Edwards rule is a far cry from the sort of decision that goes to the heart of the truthfinding function, which we have consistently held to be retroactive. [citations omitted] Rather, it is a prophylactic rule, designed to implement pre-existing rights. This Court had not applied such decisions retroactively.

The purpose of a prophylactic rule such as the one set forth in Edwards is to guide law enforcement officials in their conduct to assure the fullest implementation of an accused's pre-existing rights. To penalize law enforcement officials and indeed all the People of the State of Illinois by allowing a murderer to go free because of the inability to foresee a decision almost three years later does nothing to serve the purpose of this Court in Edwards.

Further, the evidence produced at trial established that the law enforcement officials involved conducted themselves in accordance with pre- Edwards case law. Although respondent requested counsel after arrest but before charging, respondent made no statements to any law enforcement official until he knowingly and willingly waived his right to counsel. Although respondent spoke to various police officers

after his initial arrest, on a speeding charge, in Chicago, Illinois, at Cook County Jail and later in Brookfield, Illinois, it is clear that no officer attempted to interrogate respondent concerning the murder charge. (R. 4, 6, 8-9) Subsequently, a felony review supervisor with the Cook County State's Attorney's Office informed respondent of his Miranda rights. (R. 62-63) Respondent's will had not been worn down nor was respondent badgered into surrendering his Miranda rights as was the defendant in Edwards, supra, 451 U.S. at 479. Rather, respondent, fully aware of his rights, stated that he wanted his attorney. At that time the assistant state's attorney learned from respondent who his attorney was, obtained the attorney's telephone number for respondent and gave that number to respondent. These facts were confirmed by re-

spondent. (R. 65-66, 51-52) As the assistant state's attorney walked to the door to leave and allowed respondent to call his attorney, respondent said he would tell the assistant state's attorney what had happened. (R. 66) Respondent was asked again if he wanted his attorney but declined. (R. 66) This sequence of events closely resembles those set forth by this Court in Oregon v. Bradshaw, 103 S.Ct. 2830 (1983), wherein this Court stated:

> An incarcerated person, accused of a crime, does not remain silent and speak only when conversation is initiated by others, whether by fellow prisoners, guards, or law enforcement officers. Jail or prison confinements prior to indictment or trial may extend over days and weeks, and numerous conversations customarily occur, often accompanied by

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> collateral facts and circumstances. Rarely can a Court properly focus on a particular conversation, and intelligently base a judgment on the simplistic inquiry as to who spoke first.
>
> In this case, for example, Bradshaw's initiating question . . . was not an isolated event. It was immediately followed by a renewal of Miranda warnings and additional conversation.

In the instant case respondent was allowed to consult with counsel after requesting counsel, rejected counsel, was readvised of his right to counsel and stood on his knowing waiver of those rights. Respondent, in the instant case, was not placed in a position where he was led to believe he would be prohibited from exercising his constitutional rights. Rather, the conduct of the assistant

state's attorney confirms the fact that the State was seeking to assure that respondent was able to fully implement his constitutional rights.

As this Court stated in Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019 (1983): "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." In the instant case there can be no doubt that respondent understood his right to counsel, since he requested his attorney shortly before he decided to make a statement without his attorney. Further, "[t]he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." Id. At the time of respondent's statement, respondent was

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thirty-nine-years old and had attended high school. (R. C1085) Furthermore, respondent had been gainfully employed at the same business for seven years prior to the time of his arrest. (R. C1086) Nothing in the record suggests that respondent was young, naive, incompetent or unable to knowingly waive his right to counsel.

Respondent was not subjected to interrogation prior to his waiving counsel. The communications with respondent by the assistant state's attorney prior to respondent waiving counsel and making his statement were to inform respondent of his Miranda rights and assist respondent in locating respondent's attorney's telephone number. Those acts cannot be construed as interrogation under the standard set forth in Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 1689 (1980), the Miranda decision, nor even the Edwards decision.

Respondent's claim that his statement is entitled to suppression based upon pre-Edwards case law is without merit, and respondent knowingly and willingly waived counsel prior to making any statement. Therefore this Court should review the erroneous decision of the Illinois Appellate Court.

II.

THE ILLINOIS APPELLATE COURT ERRONEOUSLY CONCLUDED THAT A VIDEOTAPE OF RESPONDENT'S STATEMENT WAS IMPROPERLY INTRODUCED INTO EVIDENCE ALTHOUGH THE VIDEOTAPE OF AN EARLIER ATTEMPT TO RECORD RESPONDENT'S STATEMENT WAS NOT PRODUCED SINCE THERE IS NO EVIDENCE OF, NOR SUGGESTION OF, WRONGDOING ON THE PART OF THE STATE AND SINCE BOTH THE STATE AND RESPONDENT AGREED THAT THE STATEMENT MADE IN THE SECOND VIDEOTAPE WAS VIRTUALLY THE SAME STATEMENT AS THAT MADE DURING THE FIRST VIDEOTAPING EFFORT AND WHERE BOTH STATEMENTS WERE VIRTUALLY THE SAME AS RESPONDENT'S INITIAL ORAL STATEMENT.

Respondent contends that reversal of his conviction can be sustained upon an independent State ground, i.e., that the

trial court erroneously admitted a videotape of respondent's statement into evidence where the videotape of an initial attempt to record respondent's statement was not produced in court. While the Appellate Court of Illinois found the admission of the videotape to be reversible error, that finding was not supported by any case law or statutory citation. The State of Illinois strongly maintains that Illinois law justifies the admission of the videotape into evidence.

After respondent made an oral statement to the assistant state's attorney, respondent was asked if he would make the statement on videotape. (R. 67) Respondent agreed and after the taping was completed an attempt was made to show the tape to respondent. (R. 67) Both respondent and the assistant state's attorney agreed that no picture came on the tele-

vision screen when that attempt was made. (R. 56, 67) New video equipment was brought in and respondent made his statement again. (R. 67-68) At the conclusion of the taping respondent and the assistant state's attorney watched the tape together. (R. 68) The assistant state's attorney testified that the second videotape contained substantially the same statement as was made during the first videotaping effort. (R.68) Respondent agreed that he did and said basically the same things during the second taping as he did during the first and that both were basically the same, as he had told the assistant state's attorney during the original oral statement. (R. 57) The assistant state's attorney did not know what had happened to the first videotape. (R. 82)

As the People and respondent are in agreement that the second taping was sub-

stantially the same as the first, and the second tape was substantially the same as respondent's initial statement to the assistant state's attorney, it is impossible to envision any prejudice whatsoever to respondent because of the unavailability of the first tape. Since the record fails to demonstrate intentional rather than inadvertent loss and since prejudice is not present, reversal of respondent's conviction of murder is unwarranted. In People v. Jiles, 13 Ill. App.3d 245, 250, 300 N.E.2d 803 (1st Dist. 1973), the appellate court held that defendant was not prejudiced by the destruction of police radio tapes where there was no evidence to indicate the tapes were destroyed to prevent their production at trial. Similarly, in People v. Utinans, 55 Ill. App.3d 306, 319-320, 370 N.E.2d 1080 (1st Dist. 1978), the Illinois Appellate Court found the

inadvertent loss of tape recordings of interviews with the victim made shortly after the offense was not prejudicial where there was no showing of an exculpatory nature of the evidence nor a demonstration of an intentional failure of the prosecutor to preserve evidence. In People v. Ash, 16 Ill. App.3d 633, 635-636, 306 N.E.2d 319 (2d Dist. 1974), the appellate court found no prejudice to defendant where a videotape was entered into evidence despite the fact that erasures on the tape by the State exceeded the deletions ordered by the court. In Ash, the court and both counsel had an opportunity to view the tape prior to the partial erasure. Id. at 636. Although the court did not view the first videotape in the instant case, respondent, a participant in both tapings, indicated that his statements in the first and second tapings were essentially the same and that

both statements were about the same as his original statement. In the instant case, neither misconduct nor prejudice were demonstrated and the appellate court was erroneous in finding the tape's admission into evidence improper.

Thus, Illinois case law does not support the Illinois Appellate Court's determination that the videotape was improperly introduced in evidence. Furthermore, even if this Court determines that an independent State ground would bar use of the videotape in evidence, it is nevertheless necessary for this Court to determine the retroactivity of the Edwards decision. Prior to the attempts, one of which was successful, to videotape respondent's statements, respondent made an oral statement to an assistant state's attorney. If retrial were necessary, the State of Illinois would seek to introduce evidence

of respondent's initial statement into evidence. Thus a determination as to the retroactivity of Edwards and indeed as to the State's compliance with Edwards, assuming, arguendo, that Edwards is to be applied retroactively, is necessary even assuming an independent State ground to support reversal.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully pray that a writ of certiorari issue to review the judgment of the Illinois Appellate Court, First Judicial District, Third Division.

Respectfully submitted,

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